Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

FRANK L. BAIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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November 1998

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QUESTIONS PRESENTED

1. Can a conviction stand for endangering human life while manufacturing a controlled substance, 21 U.S.C. § 858, where all the pertinent evidence suggests the defendant sought to eliminate danger to himself and others, and no evidence suggests any real and substantial risk of fatal injury?

2. In determining whether two counts are "closely related" under the United States Sentencing Guidelines, so as to form a single "group," must not a court combine counts involving merely incidental aggravating circumstances with the counts consisting solely of the basic underlying criminal conduct, in order to comply with the statutory command that sentences be "no greater than necessary"?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Frank L. Baird and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK L. BAIRD respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 7, 1998, affirming his conviction and sentence for attempting to manufacture MDMA, a mood-altering controlled substance, and related offenses.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit, filed July 7, 1998 (per Alito, J., with Mansmann & Cowen, JJ.), affirming petitioner's convictions on direct appeal, is not published, and has not yet been noted in a table of unpublished decisions. A copy is attached as Appendix A. (An opinion denying relief on an interlocutory appeal, entirely unrelated to the issues presented here, was published as United States v. Baird, 63 F.3d 1213 (3d Cir. 1995), cert. denied, 133 L.Ed.2d 841 (Feb. 20, 1996), rehearing denied, 134 L.Ed.2d 536 (April 1, 1996). There is no published opinion of the District Court.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit was filed July 7, 1998. Appx. A. A timely petition for rehearing was denied by Order dated August 4, 1998. Appx. B. This petition is timely filed on or before the 90th day there-

after. Rules 13.1, 13.3 (1997 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AND RULES INVOLVED

Section 858 of title 21, United States Code, provides, in pertinent part:

> Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, ... creates a substantial risk of harm to human life shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Section 2D1.10 of the United States Sentencing Guidelines provides:

> §2D1.10. Endangering Human Life While Manufacturing a Controlled Substance; Attempt or Conspiracy
>
> (a) Base Offense Level (Apply the greater):
>
> (1) 3 plus the offense level from the Drug Quantity Table in §2D1.1; or
>
> (2) 20.

Chapter 3D of the United States Sentencing Guidelines Manual ("Multiple Counts") provides, in part:

> §3D1.2. Groups of Closely Related Counts
>
> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

* * * *

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, ...

Offenses covered by the following guidelines are to be grouped under this subsection:

* * * *

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

* * * *

Specifically excluded from the operation of this subsection are:

* * * *

§§2D2.1, 2D2.2, 2D2.3;

* * * *

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

* * * *

STATEMENT OF THE CASE

This petition presents issues that arose during a jury trial and sentencing for attempted manufacture of 3,4-methylenedioxymethamphetamine (MDMA) and related federal charges.

a. Procedural History

The petitioner, Frank L. Baird, was taken into custody in his Bryn Mawr, Pennsylvania, home, without an arrest warrant, during the execution of a search warrant there on April 20, 1994. A grand jury sitting in the Eastern District of Pennsylvania filed an eight-count indictment on May 18, 1994. CA3 App 5.

On August 24, 1994, petitioner was charged as the sole defendant in a nine-count superseding indictment.[1] CA3 App 7. Count One charged conspiracy, in violation of 21 U.S.C. § 846, between about December 1990 and April 20, 1994, with persons unknown, to manufacture and distribute a mixture or substance containing a detectable amount of MDMA,[2] in violation of id. § 841(a)(1). MDMA is sometimes known as "ecstasy" or "XTC."

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[1] The superseding indictment differed from the original only in that it added Count Six, charging attempt to manufacture amphetamine. See CA3 App. 26. Mr. Baird was acquitted of this charge at trial. CA3 App. 13.

[2] MDMA is a Schedule I controlled substance, classified as a hallucinogen (not a stimulant, like its better-known partial namesake, methamphetamine). 21 C.F.R. § 1308.11(d)(10). Pharmacologically, it is actually not a hallucinogen, but rather an empathogen -- a drug that creates a feeling of pleasure for several hours, a feeling sometimes described as simulating being in love. See

Count Two alleged manufacture, on or about April 14, 1994, of approximately 20 kilograms of a mixture or substance containing a detectable amount of MDMA, in violation of 21 U.S.C. § 841(a)(1). Counts Three and Four charged possession with intent to distribute, on or about April 20, 1994, of approximately 32 kilograms of a mixture or substance containing a detectable amount of MDMA (within 1000 feet of a school, for Count Three), in violation of id. §§ 860 and 841(a)(1), respectively.

Counts Five and Six charged attempt to manufacture MDMA, and amphetamine, respectively, in violation of id. § 841(a)(1), from on or about March 10, 1994, to on or about April 20, 1994. Count Seven charged petitioner with creating a substantial risk of harm to human life, in violation of id. § 858, from on or about March 10, 1994, to on or about April 20, 1994, while manufacturing or attempting to manufacture a mixture or substance containing a detectable amount of MDMA contrary to id. § 841(a)(1).

_____(cont'd)

generally D. Nichols, Differences Between the Mechanism of Action in MDMA, MBDB, and the Classic Hallucinogens. Identification of a New Therapeutic Class: Entactogens, 18(4) Journal of Psychoactive Drugs 305, at 306 (1986). It is consumed in the salt form, 3,4-methylenedioxymethamphetamine-HCl (for hydrochloride), a crystalline powder. See R. Siegel, MDMA Nonmedical Use and Intoxication, 18(4) Journal of Psychoactive Drugs 349, at 350 (1986). It is equally a controlled substance in either the base or salt form, however. 21 C.F.R. § 1308.11(d).

Count Eight charged petitioner with maintaining a place for the manufacture of MDMA, in violation of 21 U.S.C. § 856. Finally, Count Nine charged an offense under 18 U.S.C. § 924(c), using or carrying a firearm during and in relation to a drug trafficking offense.

Following the disposition of pretrial motions and the resolution of an interlocutory appeal, trial commenced in May 1996. Petitioner was convicted after a three-day jury trial of all counts except Count Six, attempt to manufacture amphetamine, of which he was acquitted, and Count Nine, which was dismissed on the government's motion before trial.[3] CA3 App 13. Proceeding pro se, petitioner filed on May 31, 1996, within seven days of the verdict, a timely motion for judgment of acquittal notwithstanding the verdict under Fed.R.Crim.P. 29(c), or, in the alternative, for a new trial under Rule 33. CA3 App 14. By Order dated February 14, 1997, the district court denied the post-trial motion on the ground that no memorandum of law had been filed in support, and on the further basis that an independent review of the trial record showed the motion to be lacking in merit. CA3 App 15.[4]

On March 27, 1997, petitioner was sentenced. CA3 App 15. The court held that counts three and four

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[3] The prosecutor moved to dismiss this count in light of Bailey v. United States, 516 U.S. 137 (1995), which invalidated the government's theory of guilt.

[4] A counseled motion to reconsider the denial of post-trial motions was filed March 24, 1997, and denied on March 27. CA3 App 15.

merged, but not counts five and seven. The court determined that there were two count groups under the U.S. Sentencing Guidelines rather than one, as the defense contended. Over objection that the government's evidence was premised on an erroneous methodology, the court found that 6.5 kilograms of MDMA could have been manufactured by petitioner. CA3 App 560. Having determined a guideline range of 121 to 151 months, the district court imposed concurrent sentences of 136 months' imprisonment (the middle of the range) on counts 1, 2, 3, 5, and 8, and a concurrent sentence of 120 months on count 7, to be followed by four years of supervised release with conditions, plus a $5000 fine and $300 in special assessments. CA3 App 612-16. Judgment of sentence was filed April 1 and formally entered on April 2, 1997. CA3 App 16. Notice of appeal was filed on April 9, 1997. CA3 App 16 (docket), 620 (notice).

On appeal, the judgment was affirmed, with the sole exception that Counts 5 and 7 were held to be forms of the "same offense" under Blockburger v. United States, 284 U.S. 299 (1931). The panel found the evidence sufficient to sustain the conviction on Count Seven for creating a substantial risk to human life while manufacturing MDMA. The panel also upheld the sentencing court's determination that the guideline determination arising out of the Count Seven conviction did not "group" with the other counts, a ruling that added several years to petitioner's sentence. As the mandate was not stayed pending certiorari, the district court on October 23, 1998, on remand, vacated the conviction and sentence on Count Five (the lesser offense) pursuant to Rutledge v. United States, 517 U.S. 292 (1996).

Petitioner has been detained since his arrest on April 20, 1994, and is now serving his sentence.

b. Statement of Facts

Police paid Kristin Barr, a drug-abusing confidential informant, $2000 to set up petitioner Frank Baird, a brilliant but eccentric physics researcher and amateur chemist, to be arrested on charges of manufacturing 3,4-methylenedioxymethamphetamine (MDMA). CA3 App 203-04. Barr introduced petitioner to an undercover police officer, operating as her friend, "Joe." CA3 App 73. They met with petitioner three times in the spring of 1994 at the apartment where he lived over a garage on his mother's residential property across the street from the back of the Baldwin School grounds, in Bryn Mawr, Pennsylvania, and once at a club.

From these four meetings and in the resulting search, all the evidence was obtained to accuse petitioner of conspiring with persons unknown to manufacture and distribute quantities of MDMA. The searchers found many pounds of a nonconsumable mixture that tested positive for the presence of MDMA. But there was no proof that Frank Baird had ever achieved a final production of MDMA powder from that substance, and there was no evidence of any profits or wealth, no identifiable co-conspirators, no records suggesting any distributions or sales, no customers, not a single undercover buy or intercepted shipment. Very little consumable MDMA was found, none of which could be traced to the alleged manufacturing activity.

On or about March 11, 1994, Barr brought the undercover officer to Frank Baird's garage apartment. Before leaving that day, "Joe" or Barr, compare CA3 App 80 with CA3 App 178, asked petitioner for one of the capsules they had seen. Petitioner told them "no, he doesn't give them out," CA3 App 178, and said that "if we

wanted one, we could go out with him one night and he would give it to us then." CA3 App 178. See also CA3 App 80 ("would give us one or two if we went out with him").

Arrangements were later made for the three to meet again at a nightclub, and they did so on March 18, 1994. CA3 App 80-81, 178. In petitioner's parked van, he gave Barr a capsule, which he told her was ecstasy, and later another. On analysis, the two capsules proved to be MDMA. CA3 App 414-16.

On March 31, 1994, "Joe" and Barr returned to petitioner's garage apartment. CA3 App 88. There was an odor of chemicals, and a lab set up in the kitchen. Barr testified to its being smoky; the policeman did not. CA3 App 188. Petitioner showed them a regulator to run his hydrogenator, which he described as his stirrer for mixing chemicals. CA3 App 90. Petitioner said, according to the policeman's testimony, that:

> in the last stages of mixing chemicals in this stirrer, he would move that stirrer on the hand truck into the yard .... He said if he was to run that stirrer inside his apartment and there was any type of a leak, as he put it a small pinhole leak, it could cause a very serious explosion.

CA3 App 90. On cross-examination, the officer stated that the inference he drew from petitioner's telling him this was that if the stirrer was moved outside, there would not be the risk of explosion that there would be inside, or at least that it would be safer outside. CA3 App 150-51. No witness testified that there was, in fact, any leak in the equipment.

The undercover officer testified that on March 31 he saw petitioner in the process of mixing chemicals. He was siphoning a clear liquid which he said was ether from one five-gallon jar into another, which contained a dark, purplish-colored liquid. CA3 App 91. Petitioner showed his visitors how the container would get hot and smoky when he poured the chemicals. CA3 App 191. When "Joe" asked him what it was, petitioner said it was ecstasy. CA3 App 91. Petitioner explained that something had exploded when he was in the process of making ecstasy, and had splattered "the pure stuff" on the walls. CA3 App 191. (When some of this material was later scraped off the walls and tested in the DEA laboratory, it tested negative for any controlled substance. CA3 App 359-60. Apparently, petitioner had been bluffing, puffing, or dissembling about the "explosion.") During the whole conversation, petitioner was mixing chemicals, explaining the "processes he was going through, and what chemical changes were going to take place." CA3 App 92.

On April 14, there was another visit to the apartment by "Joe" and Barr; this time, "Joe" wore a concealed tape recorder. CA3 App 98.[5] When petitioner opened the door, the room was smoky. CA3 App 99. When "Joe" asked if it was dangerous to breathe the smoke, petitioner said it was not dangerous. CA3 App 99.[6] Peti-

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[5] On April 8, 1994, Barr visited petitioner at his residence alone. She wore a tape recorder, but the tape did not result in any evidence against petitioner. CA3 App 231-32.

[6] In explaining that they were not in danger, petitioner noted that the smoke was non-toxic. CA3 App 445

tioner was mixing chemicals and doing mathematical figuring. CA3 App 101. "Joe" asked petitioner what the chemicals were, and he said it was "ecstasy." CA3 App 101. It was in liquid form, maybe purple or a reddish color, like cranberry. CA3 App 196. He said he was making 20 kilograms. CA3 App 101. Petitioner explained the different reactions that "would take place." CA3 App 102.

Still during the April 14 visit, petitioner took the policeman and CI down into the garage below his apartment. Petitioner pointed to three canisters, which he said contained hydrogen, oxygen, and nitrogen. There was tubing coming from the tanks, up through the ceiling into the kitchen to the gas chromatograph. Petitioner said he used the canisters in his lab. CA3 App 106-07. There were also a couple of five-gallon containers, which the officer testified he "later found out to be ether." CA3 App 107. These were marked with a warning that they are flammable. CA3 App 108. Again, "Joe" asked petitioner for an "ecstasy" pill, but again petitioner said he did not have any to give. CA3 App 111.

On April 20, 1994, DEA agents, local police, and two chemists from the DEA laboratory executed a search warrant at petitioner's apartment and garage, and at his mother's house next door. CA3 App 249. Agents and detectives seized some of the chemicals and equipment. The agents and police took it upon themselves to destroy all of petitioner's non-drug chemicals and equipment, as

_____(cont'd)

(tape). He also answered "no" in response to Barr's question, also during the April 14 visit, "Are we gonna blow up?" CA3 App 462 (tape).

well as any chemicals "that the chemist on site felt had anything to do with drug manufacture" and "any contaminated glassware." CA3 App 323.

Testimony was presented about the flammable, hazardous properties of many of the chemicals found at petitioner's residence and precautions taken by members of clandestine lab teams in general when they execute search warrants, e.g., using a hazardous waste disposal company. CA3 App 243-45, 345-46. The DEA chemist testified that "any type of catalyst that's involved when exposed to air could be explosive, things like that." CA3 App 345-46. She had no personal knowledge, however, of any case of explosion occurring in connection with a seizure in such a lab. CA3 App 346. The government's photographs of petitioner's laboratory show that he took normal safety precautions: his gas tanks -- with proper caps -- were chained to the walls, he used a fireproof cabinet for flammable chemicals, had good ventilation, and so forth.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and was timely invoked by Notice of Appeal filed within ten days after entry of the judgment of sentence. Fed.R.App.P. 4(b).

REASONS FOR GRANTING THE WRIT

1. The court of appeals failed to apply this Court's rules of construction for criminal statutes, before finding sufficient evidence to prove a violation of 21 U.S.C. § 858, which prohibits the creation of a substantial risk of harm to human life while manufacturing a controlled substance.

Count Seven of the superseding indictment charged that petitioner Frank Baird, while manufacturing and attempting to manufacture MDMA between approximately March 10 and April 20, 1994, knowingly and willfully created a substantial risk of harm to human life, in violation of 21 U.S.C. § 858. Because the evidence was insufficient to prove that the particular kind of risk required by this statute -- if properly construed -- actually existed during that time period, or that if it existed petitioner "willfully and knowingly" created the risk,[7] his conviction on this count should have been reversed and remanded for entry of a judgment of acquittal.

The court of appeals did not discuss what must be proven under this statute before upholding the challenged conviction as based on sufficient evidence, nor has this Court or any circuit apparently ever done so. But before a court can determine whether the evidence was sufficient to prove each element of a criminal offense, it must satisfy itself of the proper construction of each

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[7] The charge that petitioner did so "knowingly and willfully" is in the indictment, but that mens rea language does not appear in the statutory text itself.

element. Failing to do so here resulted in upholding a conviction on an aggravated charge in violation of fundamental principles of federal criminal law.

This Court routinely undertakes such analysis of the legal meaning of the elements of federal criminal statutes before reviewing trial evidence for sufficiency of proof. See, e.g., United States v. Kozminski, 487 U.S. 931, 952 (1988). The panel's memorandum below, in contrast, after reviewing the bits of evidence offered at trial on this issue, simply declares, in conclusory fashion, that "the prospect of explosions" permitted an inference "that Baird's manufacturing process created a substantial risk of harm to human life," in light of "the proximity of Baird's laboratory to other residences and a school." Appx. A4. No effort was made to show how the risk, if any, was to "human life," as required under the statute, nor that any risk was "substantial," nor that the petitioner created any such risk "knowingly and willfully."

> Section 858 provides, in pertinent part:
>
> Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, ... creates a substantial risk of harm to human life shall be [punished].

Exactly what constitutes a "substantial risk of harm to human life" is not defined, either within the statute itself or in the statute containing definitions for the subchapter, id. § 802. Nor has the meaning of the terms in this 1988 statute apparently been explored and explained in reported opinions of the courts of appeals. The district court did not define "substantial risk of harm

to human life" in instructing the jury.[8]

Relying upon the ordinary and apparent meanings of the terms, informed by the requirement of strict construction of criminal statutes, it must be that a "substantial" risk is more than a mere possible risk; there must be a significant likelihood of danger. The risk must be a real and fairly great one, more severe than that inherently implicit in the process of operating a clandestine laboratory. Otherwise, anyone manufacturing a drug like MDMA would automatically be subject to conviction under 21 U.S.C. § 858 as well. Cf. United States v. Jennings, 83 F.3d 145, 152 n.6 (6th Cir. 1996) (noting that "manufacture of methamphetamine always includes use

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[8] Nor can any definition be found in such standard sources as Devitt and Blackmar's treatise (Federal Jury Practice and Instructions). Trial counsel for the defendant lodged no objection to the charge on Count Seven. Nevertheless, this instruction -- fundamentally misleading on account of its lack of elaboration -- should be seen as plain error. See Pipefitters Local 562 v. United States, 407 U.S. 385, 440-42 & n.52 (1972) (erroneous instruction on essential element is plain error). Thus, even if the evidence were somehow deemed sufficient, at least a new trial should have been granted on appeal. Counsel contested this charge in his opening statement, CA3 App 68, and on motion for judgment of acquittal, CA3 App 419-21, but neglected to ask the jury to acquit on this count in the closing. In any event, sufficiency of the evidence, in relation to a proper interpretation of the statute, can and must be reviewed without regard to the jury instructions.

of dangerously toxic chemicals"; upward sentencing departure reversed). Since the statute is one of a group that defines supplemental drug offenses involving aggravating circumstances, see 21 U.S.C. §§ 859-861,[9] that is presumably not what Congress intended.

While a statute which prohibits "creat[ing] a risk" obviously does not require proof that the danger resulted in an actual tragedy, at the same time it cannot be satisfied with evidence that a substantial risk could have existed had the defendant done something other than what he actually did and intended to do, as the court below suggested. Appx. A3-A4.

Arguably, there is an ambiguity in the statute's reference to creating a mere risk of "harm" and the further limitation that the risk be to human "life." If the degree of risk-taking that Congress sought to deter by this law were only a risk of fatalities, the words "of harm" could be seen as superfluous. This construction is to be avoided. Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that an element is rendered superfluous); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Potter v. United States, 155 U.S. 438, 446 (1894). On the other hand, a risk of harm "to human life" is necessarily a risk of death; if Congress were

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[9] Section 859 creates an additional offense of distribution to persons under 21 years of age; section 860 prohibits distribution or manufacturing near schools; section 861 bars the employment or other use of persons under age 18 in the illegal drug business.

focused on the risk of any lesser injury, the statute would speak of harm "to any person or persons," or words to that effect. Cf. Babbitt v. Sweet Home Chapter of Communities for Greater Oregon, 515 U.S.687, 702-03 (1995) (discussing ambiguities in use of term "harm" in environmental context).

Since it is not possible to give full meaning to both phrases, "risk of harm" and "to human life," without some conflict or superfluity, there is a "grievous ambiguity or uncertainty in the statute." Muscarello v. United States, 524 U.S. --, 118 S.Ct. 1911, 141 L.Ed.2d 111, 122 (1998) (quoting earlier cases). In other words, "after seizing everything from which aid can be derived," it is possible only to "guess as to what Congress intended." Id., quoting Reno v. Koray, 515 U.S. 482, 499 (1995). Thus, the rule of lenity requires that the statute be given the narrower scope. Ratzlaf, 510 U.S. at 148-49. It follows that the trial evidence must address itself to a particular, heightened level of danger and show logically, by competent evidence referencing the actual circumstances of the case, how fatal consequences were a significant possibility. The panel's memorandum opinion ignores this distinction and statutory requirement.

The evidence presented in this case established neither that petitioner created any "substantial risk," "while manufacturing [MDMA] ... or attempting to do so," nor that he created the magnitude of a risk contemplated by the statute: that of "harm to human life." At most, the evidence demonstrated that some of the chemicals found at petitioner's residence are potentially hazardous in certain circumstances not actually shown to have existed in this case. Such risks as the evidence mentioned were purely theoretical and speculative. No

witness described a substantial risk actually created by any conduct attributed to petitioner, and absolutely none to any person's life.

The district court seemed to acknowledge that the evidence was borderline in denying defense counsel's motion for judgment of acquittal on this count at the close of the government's case. The court stated that:

> As this Court sees it, looking at the evidence in its most favorable light to the government at this juncture with reference to your motion, there is at least sufficient evidence to warrant it to be given to the jury to make that determination as to whether it was harmful to human life.
>
> There is some testimony that indicates that it could have exploded at least in the apartment. That doesn't exclude anybody from walking by the apartment, from being put in an area of danger, if necessary.

CA3 App 421. The evidence of record does not rise anywhere near to the level necessary for conviction.

The panel cites the two strongest passages from the trial transcript, but these fall far short of supporting the verdict beyond a reasonable doubt. The undercover officer quoted by the panel (Appx. A3) testified that during a March 31, 1994, visit to petitioner's residence, petitioner said he moved the process outside at a certain point to avoid a risk of explosion that might otherwise arise, CA3 App 90; the witness inferred there would not be such a risk outside. CA3 App 150-51. The only evidence concerning the use of the hydrogenator (referred to as a "stirrer") thus concerned petitioner's taking precautions against any risk of danger. The only

plausible inference is that petitioner took pains not to create any risk of danger to anyone, and there is no evidence whatsoever that he ever did create such a risk, much less that he did so knowingly or willfully.[10]

The only other testimony cited by the panel (or that was invoked by the appellee) is that of a DEA chemist concerning "these types of labs" -- all of which refers to chemicals which "could be" explosive under certain circumstances ("in contact with heat or sparks" or "when exposed to air"), Appx. A4, but those circumstances were never shown to have existed at any time -- nor to have been substantially risked at any time -- during March or April 1994 while petitioner was engaged in any attempt to manufacture MDMA.

That federal agents felt they might be endangered while handling equipment and/or chemicals with which they were not fully familiar while dismantling a clandestine laboratory is no proof whatsoever that there was any danger to anyone's human life while petitioner was engaged in any manufacturing or attempted manufacturing of MDMA, as required under the statute. To the contrary, the only evidence concerning the use of the hydrogenator -- which consists of a remark by petitioner

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[10] In fact, the evidence tended to establish that no substantial risk existed. When "Joe" asked during the April 14 visit if it was dangerous to breath the chemicals, petitioner answered in the negative, explaining that the smoke was non-toxic. CA3 App 99 (trial), 445 (tape). Petitioner also answered "no" when Barr asked during the April 14 visit "Are we gonna blow up?" CA3 App 462 (tape).

himself that was uncorroborated by any physical or other evidence -- concerned his taking precautions against any risk of danger. CA3 App 90.

The mere presence of potentially harmful chemicals cannot be enough for conviction of an offense under 21 U.S.C. § 858, where, as here, there is no indication in the evidence that the defendant's handling of the chemicals during the time period charged in the indictment was anything other than appropriate and careful.[11] The government's photographs of petitioner's laboratory, introduced in evidence, show that he took the same safety precautions that are required of university labs: gas tanks -- with proper caps -- chained to the walls, a fireproof cabinet for flammable chemicals, good ventilation, and so forth.[12] There is simply no evidence of creating a danger "while" manufacturing MDMA in the

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[11] The undercover officer's testimony concerning petitioner's description at the April 14 visit of another time (no date given) that he was mixing "stuff" in the laboratory, when the lid of the container popped off and it splattered on the wall, CA3 App 102; id. 191 (similar testimony by Barr) is not relevant evidence that petitioner created the pertinent risk during the time periods alleged in this indictment, nor did that evidence show that any substantial risk to anyone's life existed in that splattering incident.

[12] The cylinders of various gases, even if somehow thought to be dangerous, were attached by tubing to the gas chromatograph and thus were not used for manufacturing but for analysis.

March-April 1994 time period charged, much less proof beyond a reasonable doubt of any substantial danger of a fatality.

Finally, the language of 21 U.S.C. § 858 presents a question of mens rea that the court below ignored, but this Court should address, in order fully to analyze the question of sufficiency of the evidence. The indictment charged that petitioner created the "substantial risk" of death "willfully and knowingly." The statute contains no express mens rea language. Nevertheless, the indictment was appropriate, because for a number of reasons scienter should be implied as an element.

Usually in the criminal law the creation of risk is associated with a merely "reckless" state of mind, or even with negligence. 1 Model Penal Code & Commentaries, pt. I, § 2.02(c) & notes (ALI 1985); 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.7, at 325-40 (1986). As the Chief Justice recently wrote for the Court in United States v. X-Citement Video, Inc., 513 U.S. 64, 130 L.E.2d 372, 381 (1994), "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize[s] otherwise innocent conduct." The creation of risk is just the sort of conduct which is not blameworthy unless accompanied by scienter. The panel memorandum fails to address at all what "willfulness" should be understood to mean in relation to "risk," or how the evidence in this case could be said to satisfy that standard. To give meaning to the "willfulness" accusation in Count Seven would seem to require something substantially more than that -- a specific intent that a substantial risk to life be created. The memorandum opinion of the court below thus fails to support a conclusion beyond a reasonable doubt that petitioner "willfully" created any such risk.

For all these reasons, this Court should issue a writ of certiorari to review the judgment and memorandum opinion of the court of appeals finding sufficient evidence to prove the offense of creating a risk of harm to life while manufacturing MDMA.

2. The Circuits are in conflict on the proper application of USSG § 3D1.2, the "grouping rule," to drug cases involving incidental aggravating circumstances; in failing to apply the guidelines in accordance with governing statutory principles, the court below mistakenly added years to the petitioner's sentence.

The district court refused to place the sentencing guideline calculation for the § 858 "endangering" count in the same "group" as the other counts. This was error, because the offense level for every count in this case, including USSG § 2D1.10 which covers the endangerment count, "is determined largely on the basis of ... the quantity of a substance involved ...." USSG § 3D1.2(d). The Third Circuit's decision, in conflict with the Ninth Circuit, held that the sentencing determination here was "correct." Appx. A5.

The district court put Count Seven (endangering life in violation of 21 U.S.C. § 858, covered by USSG § 2D1.10) in its own separate group from all the other counts, "because of the harm that is clearly foreseeable in the two different types of groupings [sic; probably meaning "offenses"]. CA3 App 499. But the relationship of the § 858 "endangering" count to the underlying drug manufacturing conduct is the same as the relationship of that conduct to the § 860 "schoolyard" count. Indeed, as the court of appeals held, sections 858 and 841 actually

describe the "same offense" under the Double Jeopardy Clause; the manufacturing count was a lesser included offense. Appx. A5-A7. (So, too, possession is a lesser included offense of possession near a school, as the district court properly held here at sentencing. CA3 App 494.) Both § 858 and § 860 penalize a theoretical impact on bystanders rather than the general societal interest in drug abuse prevention, but under the guidelines the offense levels for both are determined largely on the basis of ... the quantity of a substance involved ...." USSG § 3D1.2(d).

Because USSG § 2D1.10, the guideline for § 858 cases, is not listed under USSG § 3D1.2(d) as always being subject to grouping under that rule, "a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level." Id. Under that rule, for example, the offenses might not group if a real danger had materialized from the operation of the laboratory that caused "the quantity of [the] substance involved" no longer to "determin[e] largely" the resulting offense level. In this case, however, the entirely theoretical risk to human life that existed during the attempted manufacturing functioned, at most, as another kind of aggravating circumstance, just like petitioner's (essentially unrelated) possession of an old rifle or the (totally coincidental) nearby presence of the school.[13] The existence of an

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[13] The presence of the gun is counted as a specific offense characteristic (USSG § 2D1.1(b)(1)), while the school is described in a different statute (21 U.S.C. § 860)

additional aggravating circumstance is not proof of a different "societal interest" under § 3D1.2. The two offenses not only involved the same "course of conduct,"[14] they occurred simultaneously, by the commission of the same acts.

In this case, all of the counts, including Count Seven, involve various aggravating circumstances and specific offense characteristics relating to a single set of closely-related controlled substance violations. The guidelines for the various counts implicated are nevertheless "largely" controlled by a drug quantity analysis; see USSG §§ 2D1.1 (count 1), 2D1.2(a)(2) (count 3), 2D1.8-(a)(1) (count 8), 2D1.10(a)(1) (count 7). They therefore do not involve different "harms" as that concept is used in the grouping rule.

To impose two groups, as the court of appeals approved the district court in doing, essentially added five levels on account of the endangering conviction, rather than the three called for by the guideline, USSG § 2D1.10(a)(1), because two levels result from the extra group -- essentially doubling the resulting increase in imprisonment from about two years to about four.[15] Yet

_____(cont'd)

and thus in a different guideline (§ 2D1.2), but both of those counts automatically group, not only with the actual manufacturing counts (sentenced under § 2D1.1) and the conspiracy, but also with each other.

[14] Count Seven even alleged that the "endangering" offense continued during the entire time period covered by all the other counts of the indictment.

[15] Thus, to group all the counts is in no way to ignore the

on the lower courts' theory this occurs with no aggravating circumstance existing that is not present in every case of a § 858 violation, which by statutory definition always involves another offense punishable under USSG § 2D1.1.[16] Whatever leeway a district court may have in assigning the § 858 count to a separate group under the "case by case" clause of § 3D1.2(d) is improperly exercised in a case such as this, where the supposedly aggravating circumstance -- risk of harm -- is, on the government's theory, inherent in the underlying predicate manufacturing offense.

In a recent case, the Ninth Circuit held, in conflict with the panel here, that a defendant's convictions for conspiracy, possession and manufacturing grouped with each other and with the guideline sentence for the defendant's conviction under § 858. United States v. Brinton, 139 F.3d 718, 721 (9th Cir. 1998). That court noted that all those counts "involve the same victim (societal interest), are connected by a common scheme or plan, and carry offense levels primarily determined according to the aggregate amount of the drugs involved." Id. While recognizing that this Court does not generally sit to correct misapplications of the guidelines, even where there is a conflict in the Circuits, see Braxton

_____(cont'd)

particular harm associated with that count. To the contrary, the endangering count adds three levels to the calculation.

[16] Again, the panel implicitly recognized this by accepting petitioner's argument that § 841(a) is a lesser included offense, in "manufacturing" cases, of § 858; Appx. A5-A7.

v. United States, 500 U.S. 344, 347-48 (1991), petitioner suggests that there are special reasons to do so here.

The Sentencing Commission has recognized dozens of conflicts in the circuits concerning the meaning of various guidelines, but has acted to resolve only a few. For the past year or more it has been virtually impotent, presently having only a single member (the Chair) with a current appointment. The Court should therefore consider relaxing its Braxton policy in selected, important cases. This is such a case.

The court below ruled summarily "that the district court correctly applied the guidelines." Appx. A5. Even giving "due deference to the district court's application of the guidelines to the facts," 18 U.S.C. § 3742(e), the Third Circuit's conclusion is insupportable. To the contrary, the sentence "was imposed in violation of law," id. § 3742(e)(1), and "as a result of an incorrect application of the sentencing guidelines," id. § 3742(e)(2), because it is inconsistent with the "principle of parsimony" built by Congress into the present sentencing system and applicable to the Commission as well as to the courts: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment, as set forth in the Act." 18 U.S.C. § 3553(a) (emphasis added); see also id. § 3553(b) (court also "shall impose" sentence within guideline range, absent proper departure); 28 U.S.C. § 994(b)(1) (guideline must be designed so as to comply with all provisions of title 18, including § 3553(a)). Instead, the sentencing court here treated the count of manufacturing plus risk-to-life separately from the count alleging possession plus proximity-to-school, thus doubling the proper impact of the § 858 count.

The decision on this issue presents a guideline interpretation issue which not only is significant in its impact on this petitioner but also is of general importance. Allowing arbitrary misapplications of the guidelines to stand under the guise of discretion threatens the uniformity and predictability that are among the most salutary features of the Sentencing Reform Act system. The result in his case was the unjustified addition of about two years to petitioner's already-heavy sentence. This Court should grant certiorari to review and reverse the decision below, at the very least as to the two-level upward guideline adjustment that resulted from the failure to "group" all the counts. Applying the rules of Chapter 3D correctly, only a single count group existed. The case must be remanded for resentencing at a point at least two levels lower. For all these reasons, a grant of certiorari is warranted here.

CONCLUSION

For the foregoing reasons, petitioner FRANK L. BAIRD prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence.

Respectfully submitted,

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Attorney for Petitioner

November 4, 1998.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1253

UNITED STATES OF AMERICA
v.
FRANK L. BAIRD,
Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 94-00215)
District Judge: The Honorable J. Curtis Joyner
Submitted Under Third Circuit LAR 34.1(a)
January 28,1998

Before: MANSMANN, COWEN, ALITO,
Circuit Judges
(Opinion Filed: **JUL 07 1998**)

OPINION OF THE COURT

ALITO, Circuit Judge:

Following a jury trial, Frank L. Baird was convicted of six controlled substance offenses involving

3,4-methylenedioxymethamphetamine ("MDMA"). On appeal, Baird [*2] contends: 1) that the government presented insufficient evidence to support a conviction on either count one or count seven of the indictment; 2) that the district court should have suppressed evidence seized from Baird's mother's house; 3) that the prosecutor prejudiced the jury by revealing that Baird wore women's clothing on certain occasions; 4) that the district court incorrectly calculated Baird's sentence under the sentencing guidelines; and 5) that the district court's failure to merge count five with count seven for sentencing purposes violated the Double Jeopardy Clause. While we are not persuaded by Baird's first four arguments, we agree with his final contention that his conviction and punishment for both count five and count seven violated the Double Jeopardy Clause. Accordingly, we will vacate the district court's judgment insofar as it imposes a conviction and sentence on count five.

I. SUFFICIENCY OF THE EVIDENCE

A. Count One: Conspiracy to Manufacture and Distribute MDMA

In order to establish that a defendant is guilty of conspiracy, "the government must prove unity of purpose, the intent to achieve a common goal, and an agreement to work together towards that goal." United States v. Powell, 113 F.3d 464, 467 (3d Cir. 1997). The government may prove all of these elements by circumstantial evidence. Id. Viewing the present record in the light most favorable to the government, we find that there was sufficient circumstantial evidence to allow a reasonable jury to conclude that Baird had partners in California with whom he conspired to manufacture and distribute

[*3] MDMA. Baird admitted to an undercover officer that he had "partners" and explained that he received only a portion of the profit from his drug manufacturing. App. at 460. In addition, the evidence showed that Baird shipped the substance he was manufacturing to California, App. at 92, 190, and received correspondence from California regarding a procedure that could be used to manufacture MDMA. App. at 303-04; 397-98; 476-80. Taken together, the evidence presented by the government was sufficient to support the jury's conclusion that Baird conspired to manufacture and distribute MDMA.

B. Count Seven: Endangerment of Human Life

Baird next contends that there was insufficient evidence to demonstrate that he created "a substantial risk of harm to human life" while manufacturing MDMA. 21 U.S.C. § 858. This argument is unavailing in light of the testimony presented to the jury.

The undercover officer who observed Baird's laboratory equipment testified as follows:

> A: [Baird] described and told me that he would mix his chemicals in the last stages of mixing chemicals in this stirrer, and he would move that stirrer on the hand truck outside into the yard.
>
> Q: Did he say why he moved it outside?
>
> A: Yes. He said that if he was to run that stirrer inside his apartment and there was any type of leak, as he put it a small pinhole leak, it could cause a very serious explosion.

App. at 90 (emphasis added). In addition, the jury heard from a government chemist who testified as to the

hazards associated with operating a clandestine laboratory such as [*4] Baird's:

> A: There are a lot of chemicals and solvents that could be highly explosive and flammable in contact with heat or sparks . . . .
>
> Q: What type of materials would be explosive in nature that you encounter in these types of labs?
>
> A: The solvents encountered could be ether, things like acetone, methanol. Any type of catalyst that's involved when exposed to air could be explosive, things like that.

App. 345-46 (emphasis added).

A reasonable jury, after hearing about the prospect of explosions, as well as the proximity of Baird's laboratory to other residences and a school, could conclude that Baird's manufacturing process created a substantial risk of harm to human life.

II. Motion to Suppress Evidence

Baird argues that there was no probable cause to issue a search warrant for his mother's residence. However, the affidavit presented to the magistrate included: 1)information from a confidential informant that Baird was manufacturing MDMA in the basement of his mother's residence, 2) information from an under-cover officer that confirmed related allegations made by the confidential informant; and 3) information from the undercover officer regarding his own observation of numerous bottles of powder and liquids and glass beakers in the basement of Baird's mother's residence. App. at 42. On this record, we find that affidavit

provided a sufficient basis for the issuance of a search warrant.

[*5] III. References to Baird's Cross-Dressing

Baird correctly points out that the prosecutor and two government witnesses improperly referred to the fact that Baird wore women's clothing. This error, however, was harmless given the isolated nature of the references. Additionally, the fact that the jury acquitted Baird on count six of the indictment suggests that the jury reached its verdict based on the evidence and not the references in question. Therefore, we conclude that the references did not deprive Baird of a fair trial.

IV. Sentencing Guidelines

Baird argues that the district court made several errors when calculating his sentence under the guidelines. After reviewing these claims, we are convinced that the district court correctly applied the guidelines.

V. Double Jeopardy

Relying on the Double Jeopardy Clause, Baird contends that the district court erred in sentencing him on both count five (which charged that he attempted to manufacture MDMA from about March 10, 1994, to April 20, 1994) and count seven (which charged him with endangering human life while manufacturing or attempting to manufacture MDMA during the same time period). Appellant's Br. at 54. Baird argues that these two offenses are the same under the rule set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), and under the Double Jeopardy Clause. Appellant's Br. [*6] at 54.

In response, the government appears to argue as follows. In instructing the jury on the elements of count seven, the district court did not state that the defendant could be convicted based on proof that he endangered human life while manufacturing or attempting to manufacture the drug -- even though that is what the statute, 21 U.S.C. § 858, and the indictment, App. 27, state. Instead, the district court told the jury that count seven charged that "[t]he defendant engaged in the manufacture of a controlled substance" and "while doing so . . . created a substantial risk of harm to human life." App. 431 (emphasis added). The evidence showed that Baird actually manufactured MDMA on April 14, 1994. Therefore, Baird's conviction on count seven was based on proof that he endangered human life while actually manufacturing MDMA on April 14, whereas his conviction on count five was based on attempts to manufacture MDMA "on other dates in March and April 1994." Appellee's Br. at 39.

In reply, Baird maintains, first, that if count seven was based on the actual manufacture of MDMA on April 14, it would charge the same offense as count two, which charged that he illegally manufactured MDMA on that date and, second, that the jury could "easily have understood the phrase `engaged in the manufacture of,' coined by the district court for jury instruction purposes, as including attempted manufacturing as well as completed manufacture." Reply Br. at 16.

We agree with Baird that the Double Jeopardy Clause was violated. First, we believe that count seven, as submitted to the jury, must be viewed as charging that the [*7] defendant endangered human life while manufacturing or attempting to manufacture MDMA. We

reject the government's argument that the court's instructions narrowed the charge to one requiring actual manufacture. Instead, we view the phrase "engaged in the manufacture of" as a shorthand for the element set out in the statute and the indictment. Second, when count seven is understood in this way, it is clear that it charges the "same offense" as count five under the Blockburger rule because count five does not require proof of any fact that count seven does not. See Rutledge v. United States, 517 U.S. 292, 297 (1996). Third, because the two offenses are the same under the Blockburger rule, we presume that Congress did not intend that multiple punishments be imposed, and the government has not argued in this case that this presumption has been overcome. It follows that Baird's sentence and conviction on count five must be vacated. See Rutledge, 517 U.S. at 305-07.

For these reasons, we vacate Baird's sentence and conviction on count five, but we affirm the judgement [sic] of the district court in all other respects.

TO THE CLERK OF THE COURT:
Kindly file the foregoing Opinion.

_s/*Samuel A. Alito*_____
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1253

UNITED STATES OF AMERICA
v.
FRANK L. BAIRD,
Appellant

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

_s/*Samuel A. Alito*__
Circuit Judge

DATED: **AUG 07 1998**